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No. 98-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ATLANTIC LLOYD'S INSURANCE COMPANY OF TEXAS, ATLANTIC MUTUAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, H.R. MANAGEMENT COMPANY, HARRY W. REED, and GRAYSTAR MANAGEMENT,

Petitioners,

vs.

THE ZURICH INSURANCE COMPANY and DIANNE THOMPSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

The parent of Respondent The Zurich Insurance Company is Zurich Insurance Company. There are no nonwholly owned subsidiaries of Respondent The Zurich Insurance Company.

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STATEMENT OF THE CASE

A. The Parties and the Underlying Cases.

This proceeding arises from two consolidated toxic tort cases (the "Chlordane Case") brought in 1988 and 1989 in state court in Houston, Texas, which were removed to the United States District Court for the District of Columbia in 1990 and then transferred to Judge John Rainey in the Southern District of Texas, Houston Division, in 1991. The Chlordane Case, which involved many parties who settled at different points in time, concluded with a final judgment entered March 23, 1993.

Thereafter, in 1996, Respondents and others brought suit in state court in Harris County, Texas, complaining of fraud arising out of the settlement reached in the Chlordane Case (the "Fraud Case"). Petitioners' removal of the Fraud Case gave rise to the appellate ruling here in issue.

The parties to the final judgment in the Chlordane Case, which was entered pursuant to a settlement, included Respondent Dianne Thompson and Petitioner H.R. Management Company ("HRM").

The Atlantic Insurance Companies were insurers, not parties, in the Chlordane Case and are defendants in the Fraud Case and Petitioners herein. The other defendants in the Fraud Case are Petitioners HRM, Harry Reed (HRM's owner), and Graystar Management (HRM's successor in interest). Respondent The Zurich Insurance Company ("Zurich") was an insurer, not a party, in the Chlordane Case on behalf of HRM and others, and Zurich joined Respondent Dianne Thompson and others as a plaintiff in the Fraud Case.

B. Course of Proceedings Below.

The Respondents, along with the other plaintiffs, filed the Fraud Case in state court in Harris County, Texas, on or about October 4, 1996. Substantially all of the plaintiffs were citizens of Texas. Named as defendants were Petitioners Atlantic, Centennial, and Atlantic Lloyd's. Also named as defendants in the Fraud Case were HRM, HRM's owner, Harry Reed, and HRM's successor in interest, Graystar Management. All of the defendants in the Fraud Case were citizens of Texas except for Atlantic and Centennial. The plaintiffs alleged a number of state law claims. No federal claims were asserted. *See generally* Petition, App. H at 27a-49a (Plaintiffs' First Amended Original Petition in the Fraud Case).

This jurisdictional dispute arose because of Count One of the Original Petition. By Count One, Respondents alleged that the Petitioners had fraudulently induced them to settle the Chlordane Case for at least $15 million less than its settlement value. No equitable relief was sought in Count One, only damages. Petition, App. H at 36a.

On or about November 1, 1996, Petitioners removed the Fraud Case to the United States District Court for the Southern District of Texas. The removal papers claimed, *inter alia*, that Count One by the Respondents was barred by an earlier federal judgment entered pursuant to a settlement in the Chlordane Case. The Fraud Case was assigned to Judge Melinda Harmon. Judge Harmon did not transfer the Fraud Case to Judge John Rainey, who had presided over the earlier Chlordane Case. Nor was the Chlordane Case administratively reopened and consolidated with the Fraud Case.[1]

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1. Respondents note that, were supplemental jurisdiction the operative concept, then the state law claims alleged in the Fraud Case

(Cont'd)

On November 27, 1996, Respondents filed a Motion and Brief to Remand in the Fraud Case. Respondents alleged, *inter alia*, that they were not seeking to set aside a federal settlement or a federal judgment; that, under *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), the Southern District had no supplemental jurisdiction over settlements in the Chlordane Case; that *ALFAB, Inc. v. CNA Financial Corp.*, 877 F. Supp. 1538 (M.D. Ala. 1995), decided post-*Kokkonen*, was directly on point; that no federal question was alleged in the Fraud Case; and that there was no diversity jurisdiction.

On April 21, 1997, the district court entered its order denying remand. *See* Petition, App. B at 5a-9a. The district court found that Count One was an "artful" attempt to attack a federal judgment; that an action in state court attacking a federal judgment involves a "federal question" invoking the original jurisdiction of federal courts; that there is no discernable difference between an action for fraud seeking damages and an action seeking to set aside a judgment; and that *Kokkonen* limits the jurisdiction of courts to enforce settlements but is inapplicable to fraud cases, where "[f]ederal jurisdiction is even more essential." *Id.* at 7a-8a. The district court also, *sua sponte*, ordered Respondents to replead under Rule 60, FED. R. CIV. P., within 15 days or face dismissal of their claims.

Respondents refused to replead because they would not be forced to plead into the jurisdiction of the district court and

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(Cont'd)
should have been appended to the Chlordane Case before Judge Rainey. Presumably this would have required a transfer and consolidation of the Fraud Case with the closed Chlordane Case. By attempting to maintain jurisdiction over the state law claims in her court, Judge Harmon relied solely on original, federal question jurisdiction over the state law claims in the Fraud Case. *See* discussion of *Rivet v. Regions Bank of La.*, __ U.S. __, 118 S. Ct. 921 (1998) and the well-pleaded complaint rule, *infra*.

because they believed that Rule 60 was an optional remedy even if the district court had original jurisdiction. Further, Rule 60 would have required a motion to be filed in Judge Rainey's Court in the Chlordane Case, which had never been reopened or consolidated with the Fraud Case. The district court, on August 6, 1997, entered an order that summarily disposed of all of the claims then alleged in Respondents' state court petition. Of particular importance to this proceeding, the district court, acting without motion, notice, hearing or evidence, dismissed with prejudice Zurich's fraud claim under Count One of the Petition. The sole reason given was that Respondents had failed to replead Count One under Rule 60. Zurich was not a party to the Chlordane Case, or to the HRM settlement and judgment in the Chlordane Case, and, therefore, could not possibly seek relief under Rule 60.

After the district court denied remand, Respondents sought mandamus relief in the court of appeals, seeking (i) the reversal of the district court's April 21, 1997 order denying remand and (ii) an order of remand from the court of appeals. In its June 2, 1998 order reversing and vacating the district court's order denying remand, the court of appeals noted the following key facts of importance to this appeal:

1. The district court's order of dismissal in the Chlordane Case "did not adopt or approve the terms of the settlement" entered into by the parties;

2. The fraud alleged in the Fraud Case "was practiced upon the parties, not upon the court;" and

3. The plaintiffs in the Fraud Case seek "damages for fraudulent inducement in making the

> settlement" at issue and do not attempt to "circumvent the order of dismissal" in the Chlordane Case.

Petition, App. A at 2a, 3a. The following language from the court of appeals' order is instructive:

> The present suit is one for damages for fraud. It does not seek to reopen the dismissed case nor does it question the validity of the judgment dismissing that case. It claims that the fraud was practiced upon the parties, not upon the court. Thus, our decision in *Villareal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) is not applicable. There we upheld removal because plaintiff was using the second state court suit to increase his personal injury recovery and to circumvent two orders of the federal court. Here plaintiffs are not trying to circumvent the order of dismissal. Rather, they allege a separate state law cause of action for which they seek damages. The issue of the first suit (whether spraying the chemical caused injury) is not at issue in the present suit for fraud.

Id. at 3a-4a. The court of appeals vacated the district court's order denying remand, but did not remand the case to state court because the question of diversity jurisdiction had not been addressed by the district court. *Id.* at 4a.

C. Statement of Facts.

The sole basis for sustaining subject matter jurisdiction in the district court was the alleged nexus between the Chlordane Case and the Fraud Case. In its order denying remand, the district court concluded that the claims in the Chlordane Case

and the claims in the Fraud Case "involve the same inquiry on the same facts and seek essentially the same damages." *See* Petition, App. B at 8a. A brief examination of the factual grounds underlying the two suits shows the error in this conclusion.

1. *The Chlordane Case*

The plaintiffs in the Chlordane Case, including Respondent Thompson, were former residents or employees at the Fondren Green Apartments in Houston, Texas. They claimed they were exposed to dangerous levels of chlordane, a highly toxic substance of which the use is strictly controlled by both state and federal authorities. *See* Petition, App. H at 31a, 33a-34a.

A description of the operative facts in the Chlordane Case is set forth in portions of a confidential status report by Vial, Hamilton, Koch & Knox, lawyers for HRM and Atlantic. Portions of this report are excerpted in the plaintiffs' petition in the Fraud Case. *See* Petition, App. H at 33a-34a, 47a. In evaluating the Chlordane Case, the lawyers for Atlantic made the following conclusions:

1. Clara Tanner, the H.R. Management employee responsible for choosing the chlordane, knew before any was applied in the apartments that it was improper and even criminal to use the substance indoors.

2. H.R. Management obtained the chlordane for use in the apartments by affirmatively lying to the supplier, Wolf Nursery, as to how the material was to be used.

3. Federally imposed labeling guidelines for chlordane products would have disclosed that H.R. Management's method for application of the product was improper and that the material was dangerous and poisonous.

4. Under applicable regulations, the chlordane, once obtained, should only have been applied by licensed pesticide applicators and not by the untrained, unsupervised workers that H.R. Management actually used.

Id. at 47a.

The analysis by Vial, Hamilton also contained an estimated range of damages sustained by the various plaintiffs in the Chlordane Case. At that time, the total range of damages exceeded $22,000,000. *Id.* at 46a, 48a-49a.

2. *The Fraud Case.*

The question of the existence of federal jurisdiction in the Fraud Case is determined by reference to the factual allegations of the plaintiffs' petition in the Fraud Case, which states:

Petitioner HRM had disclosed three insurance policies that were potentially applicable to the claims in the Chlordane Case. All policies were issued by the Atlantic Group. These three policies were a $300,000 policy by Atlantic Lloyd's, a $10,000,000 policy by Centennial, and an earlier $15,000,000 policy by Centennial. *Id.* at 31a. In order to induce the plaintiffs in the Chlordane Case to settle for policy limits, lawyers for the insurance carriers and HRM represented that Centennial had denied coverage under the $15,000,000 policy, that the $300,000 policy had been exhausted by earlier settlements, and

that something slightly less than $10,000,000 of policy benefits remained. *Id.* at 31a, 32a.

Years after the conclusion of the Chlordane Case, lawyers for the plaintiffs in the Chlordane Case learned that the representations on which the plaintiffs had relied were false. Centennial had not rejected coverage under the $15,000,000 policy. Indeed, the $10,000,000 used to settle the Chlordane Case on behalf of HRM was paid under the $15,000,000 policy. *Id.* at 32a.

Thus, as the court of appeals correctly noted, "[t]he issue of the first suit (whether spraying the chemical caused injury) is not at issue in the present suit for fraud." Petition, App. A at 3a-4a. The district court's contrary conclusion was clearly wrong.

SUMMARY OF ARGUMENT

Federal courts must trust state courts to respect federal judgments. Simply because a cause of action or an item of damage pled in state court might tread upon a prior federal judgment is no excuse for inventing federal jurisdiction. State judges are competent to apply defenses of *res judicata* and collateral estoppel, and their decisions in this regard are ultimately subject to review by this Court. Indeed, in an extreme case, a federal court may issue an injunction to stop a state court from disobeying a federal judgment. Dislike or distrust of state courts does not give a federal district court the right to enlarge upon the constitutional limits of its power.

Federal jurisdiction falls into two categories: original and supplemental. Original, federal question jurisdiction is subject to the well-pleaded complaint rule in all cases except where legislation enacted by Congress has completely preempted a

field of law. Where supplemental jurisdiction exists, it necessarily comes to an end not later than the date on which the trial court loses jurisdiction over its judgment, except in those rare cases where the trial court expressly retains jurisdiction over settlements. In the case at bar, the Southern District's supplemental jurisdiction over the earlier Chlordane Case came to an end not later than thirty days after the entry of final judgment.[2] Even had Respondents wanted to invoke federal jurisdiction, they were powerless to do so. *See Kokkonen,* 511 U.S. at 378.

However, this is all irrelevant because Respondents chose to invoke only state law, as was their right. No federal question was pled, and diversity was completely lacking. If the case pled by Respondents represents an attack on a federal judgment, which clearly it does not, Petitioners are protected by affirmative defenses of *res judicata* or collateral estoppel in the state court. *See Rivet*, __ U.S. __, 118 S. Ct. at 926.

Even if attacks on federal judgments were removable, which they are not, this was not an attack on a federal judgment. Respondents did not file suit in state court in an effort to relitigate the claims alleged in the Chlordane Case. Rather, they filed suit in state court seeking damages for an alleged fraud committed by the insurance carriers who defended the Chlordane Case. Respondents did not seek to set aside a federal judgment. They did not ask for rescission of the settlement that gave rise to the federal judgment. They only asked for damages equal to the difference between what the insurance carriers paid in settlement and what they would have paid but for their fraud.

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2. The district court in the Chlordane Case did not reserve jurisdiction to enforce the parties' settlement agreement. Petition, App. J at 54a-56a. To the contrary, as the court of appeals concluded, the order "did not adopt or approve the terms of the settlement." Petition, App. A at 2a.

Nor can it be contended, as did the district court, that Rule 60 is the sole remedy for fraudulently induced settlements. The common law of Texas provides Respondent Thompson with a remedy for fraudulently induced contracts, and a settlement, even one in federal court, is a contract. Rule 60 cannot preempt the common law of Texas. Only Congress can pass legislation that preempts state law. Certainly, this Court, through its rule making authority, cannot preempt state law. Indeed, Federal Rule of Civil Procedure 82 expressly provides that the Federal Rules of Procedure cannot increase the jurisdiction of federal courts. FED. R. CIV. P. 82.

The questions Petitioners present for this Court's review must be answered against them. The first question, whether federal courts have jurisdiction over independent actions seeking damages for fraud arising from the settlement and dismissal of a prior federal action such that removal of such an action from state court is proper, is controlled by this Court's decisions in *Kokkonen* and *Rivet*.

Petitioners' second question, whether the court of appeals exceeded its jurisdiction in ruling, as part of its decision on Respondents' mandamus petition, that the district court erred in finding federal question jurisdiction of a removed case, is answered by reference to settled precedents of this Court holding that appellate courts have a special obligation to satisfy themselves of appellate and district court jurisdiction. The court of appeals' ruling that there is no federal question jurisdiction was proper, and the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THIS APPEAL IS AN IMPROPER ATTEMPT TO OBTAIN APPELLATE REVIEW OF THE DISTRICT COURT'S REMAND ORDER.

After the court of appeals issued the ruling challenged by Petitioners, the district court ordered the Fraud Case remanded to state court. Petition, App. F at 15a-24a. Under 28 U.S.C. § 1447(d), remand orders in cases other than civil rights cases are not "reviewable on appeal or otherwise." The district court's order of remand forecloses appellate review of pre-remand jurisdictional rulings in the Fraud Case and moots Petitioners' appeal.[3]

The Petition is an exercise in futility. There is no relief to be granted to Petitioners because the Fraud Case has already been remanded and cannot be "unremanded." Even if the court could somehow "unremand" the Fraud Case, then the court would be doing indirectly what the law prohibits it from doing directly — reviewing an order of remand. Were the Petitioners sincere about having the opinion of the court of appeals reviewed by this Court, they could have easily moved the district court to delay its decision on whether to remand the Fraud Case pending this Court's certiorari review of the court of appeals' decision. This they did not do.

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3. *Seedman v. United States Dist. Court*, 837 F.2d 413, 414 (9th Cir. 1988) (after certification to state court, a federal court cannot vacate a remand order issued under section 1447(c)); *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 167-68 (5th Cir. 1986) (same).

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THERE IS NO FEDERAL QUESTION JURISDICTION IN THIS CASE.

A. Petitioners misstate the record and rely on inapposite authority.

1. *Petitioners misstate the record.*

In an attempt to distance themselves from this Court's rulings in *Kokkonen* and *Rivet*, Petitioners misstate the record in this case in at least two material respects. As will be seen, these factual misstatements significantly affect the analytical framework to be applied to the legal questions presented in the Petition. Under a proper factual and legal analysis, which necessarily requires consideration of *Kokkonen* and *Rivet*, Petitioners' claims are without merit.

First, notwithstanding the plain language of the plaintiffs' petition in the Fraud Case, Petitioners describe Respondents' claims in the Fraud Case as a collateral attack on the dismissal order in the Chlordane Case. *E.g.*, Petition at 4 ("on its face Plaintiffs' suit is a collateral attack on the earlier federal court judgment of dismissal"); Petition at 19 ("regardless of how Plaintiffs denominate their claims, their suit is an independent action for relief contemplated by Rule 60(b)"). The court of appeals correctly held that Respondents "are not trying to circumvent the order of dismissal" and instead "allege a separate state law cause of action for which they seek damages." Petition, App. A at 3a.

Second, disregarding the unambiguous terms of the order dismissing the Chlordane Case, Petitioners attempt to categorize

the order as a consent decree by alleging that the district court "approved" Respondents' settlement in the Chlordane Case. *E.g.*, Petition at 5 ("Judge John D. Rainey entered an order approving the settlement"); Petition at 19 ("before seeking an additional monetary award, Plaintiffs here must set aside the *court approved settlement* and federal judgment of dismissal") (emphasis supplied). The dismissal order in the Chlordane Case was accurately characterized by the court of appeals in its finding that the order "did not adopt or approve the terms of the settlement." Petition, App. A at 2a.

2. *Petitioners rely on inapposite authority in an attempt to create a conflict among the circuits.*

Petitioners' factual mischaracterizations lead them to proffer improper legal analyses of their claims. The heart of Petitioners' argument is that there is a conflict among the circuits regarding "whether state court actions collaterally attacking the validity of a federal judgment can be removed." Petition at 9, 10. No such conflict is presented in this case, as there is no collateral attack by Respondents on a federal judgment. Petitioners' argument is thus factually insupportable.

In an attempt to create a conflict among the circuits justifying this Court's attention to this case, Petitioners cite to two general classes of cases. First, Petitioners cite numerous consent decree and class action settlement cases analyzing jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). Petition at 12-14. Second, Petitioners cite decisions in which federal judgments are directly attacked, typically under Rule 60(b), for alleged fraud on the court. Petition at 14-15. Neither class of cases is applicable to the straightforward facts of this case.

Petitioners' efforts at conjuring up a conflict among the circuits fails. The conflict alleged by Petitioners requires a collateral attack on a federal judgment. The court of appeals correctly held, consistent with *Kokkonen* and *Rivet*, that there is no collateral attack. Moreover, it is undisputed that Respondents did not plead under Rule 60 and refused to so plead despite an order to do so from the district court in the Fraud Case.

3. *The All Writs Act does not apply.*

The All Writs Act does not apply in this case for two reasons. First, the Act is not at issue in this case. Petitioners belatedly raise the argument for the first time in this Court. They did not argue the Act's application in any of their filings in the district court or the court of appeals, and the Act is not mentioned in, and does not form the basis of, any ruling by the district court or the court of appeals. There is no reason for the Court to consider the Act in this case. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (Supreme Court does not ordinarily consider questions not specifically passed on by the lower court; question considered when raised in Petitioners' complaint, acknowledged by district court and court of appeals, and district court made findings on all factual issues necessary to resolve the question).

Second, the All Writs Act is inapplicable because (i) the dismissal order in the Chlordane Case is not a consent decree or an order over which the district court retained jurisdiction and (ii) Respondents' claims in the Fraud Case do not constitute a collateral attack on the dismissal order in the Chlordane Case. The court of appeals found that the district court in the Chlordane Case did not adopt or approve the terms of the settlement. Petition, App. A at 2a. Nor is there any language in the dismissal order to suggest that the district court reserved

jurisdiction to enforce the terms of the settlement. As a result, the many "consent decree" and "class action settlement" cases relied on by Petitioners, in which the district court retained jurisdiction over a federal judgment pursuant to the All Writs Act, are inapplicable.

The All Writs Act is not an independent grant of jurisdiction to a court. Rather, it "merely permits a court to issue writs in aid of jurisdiction acquired to grant some other form of relief." *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 77 (D.C. Cir. 1984), *citing Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968) and *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906). Unless federal jurisdiction over the case otherwise exists, the All Writs Act does not independently confer jurisdiction. Even if it did, however, Petitioners did not invoke it at any point in the proceedings below and may not now do so.

B. There is no original or removal federal question jurisdiction in this case.

The scope of statutory federal question jurisdiction under 28 U.S.C. § 1331 is narrower than the constitutional grant. *See Verlinden B.V. v. Central Bank*, 461 U.S. 480, 493 (1983). Federal question jurisdiction is analyzed under the mandates of the "well-pleaded complaint" rule:

> Whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983); *see also Rivet*, 118 S. Ct. at 925. The existence of a federal defense to a state law claim does not confer federal jurisdiction. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840-41 (1989). Instead, a suit arises under federal law for purposes of 28 U.S.C. § 1331 only "if there appears on the face of the complaint some substantial, disputed question of federal law." *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. *See Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986).

The same basic tenets apply to federal question removal jurisdiction. A defendant may only remove an action from state court on federal question grounds if the action could have been brought originally in federal court. 28 U.S.C. § 1441. A plaintiff may thus generally defeat removal by choosing to base his action solely upon state law, even if the allegations of the complaint could support a claim under federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A defendant may not remove an action from state court based upon a federal defense. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. at 840-41. The defendant can only remove a case to federal court if the plaintiff must "establish both the correctness and applicability to his case of a proposition of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. at 9.

1. *Rivet and Alleged Attacks on Federal Judgments.*

In *Rivet*, this Court clarified that state suits alleging claims inconsistent with federal judgments do not create a federal question. There, this Court held that removal may not be predicated on a defendant's assertion that a prior federal

judgment had disposed of the entire matter and thus barred the plaintiffs from later pursuing a state-law based claim. *Rivet*, 118 S. Ct. at 926. The plaintiff in *Rivet* had filed a state court lawsuit to foreclose on certain real property. The defendants removed the case to federal court, asserting that the plaintiff's suit was preempted by a prior federal judgment. The district court failed to remand the case, instead granting summary judgment to the defendants based on the prior federal judgment. *Id.* at 924. The Fifth Circuit affirmed, holding that removal was proper "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." *Rivet v. Regions Bank*, 108 F.3d 576, 586 (5th Cir. 1997), *rev'd*, 118 S. Ct. 921 (1998).

This Court reversed. The Court analyzed the citizenship of the parties and the claims the plaintiff had advanced in the state court and determined that no federal jurisdiction existed. *Rivet*, 118 S. Ct. at 925-26. The Court held that the fact that the plaintiff's claim may relate closely to the subject matter of a prior federal judgment does not give rise to federal question removal jurisdiction. *Id.* at 926. The fact that the state court claim may seek relief that a federal court has already considered and ruled upon does not turn the suit into a federal lawsuit. *Id.*

The Court acknowledged the "artful pleading doctrine," pursuant to which removal may be upheld even if no federal question appears on the face of the plaintiff's complaint. *Id.* at 925. That doctrine allows removal where federal law completely preempts a plaintiff's state law claim. *Id.* Federal preemption is ordinarily merely a defense which will not support removal. *Id.* Once an area of state law has been *completely preempted*, however, any claim purportedly based on that preempted state law claim is considered, from inception, a federal claim that arises under federal law. *Id.* The Court held that no complete preemption obtains even when a party seeks to relitigate a matter previously decided by a federal court. *Id.* at 926.

The present case does not raise a federal question. The original state court petition in the Fraud Case raised only state law claims of fraud, conspiracy to defraud, subrogation, wrongful inducement to breach fiduciary duty, and unlawful trade practices. *See* Petition, App. H. The Plaintiffs in the Fraud Case did not plead "*res judicata*," "collateral estoppel" or "Rule 60." No federal question appears on the face of the petition. The Fraud Case, like *Rivet*, was *not* removable.

2. *"Artful Pleading" Does Not Apply: Rule 60, Rule 82, and the Preemption Doctrine.*

This case, like *Rivet*, is *not* a case of artful pleading. Before the "artful pleading" doctrine is invoked, federal law must "completely preempt" an area of state law. *Rivet*, 118 S. Ct. at 925.

The "artful pleading" doctrine applies only where Congress has so completely preempted a particular area of the law that any civil complaint raising the select group of claims is necessarily federal in character. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). Complete preemption applies only in the extraordinary circumstances when Congress intends, not merely to preempt state law, but to transfer jurisdiction to decide the preemption question from state to federal courts. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1253 (6th Cir. 1996). This Court has been so reluctant to find complete preemption that it has limited complete preemption to two federal statutes — the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (ERISA). *See, e.g., Dobberowsky v. Cryogenic Transportation, Inc.*, 989 F. Supp. 848, 852-53 (E.D. Mich. 1997); *Metropolitan Life Ins. Co.*, 481 U.S. at 65-66; *Avco Corp. v. Machinists*, 390 U.S. 557, 560 (1968). No federal law "completely preempts" any of the claims in the Fraud Case.

Federal Rule of Civil Procedure 60 does not preempt the common law of Texas. Rule 60 is not legislation. It does not reflect *Congress'* intent to preempt a body of state law. Instead it is a rule adopted by this Court setting forth procedures applicable to federal courts. The rule does not purport to govern the conduct of state court litigants. Federal jurisdiction is not derived from Rule 60(b) itself. *See, e.g., In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995). Indeed Rule 82 specifically mandates that Rule 60(b) and all other federal rules "shall not be construed to extend . . . the jurisdiction of the United States district courts." FED. R. CIV. P. 82. For a federal court to have jurisdiction over a suit that might fit with the framework of Rule 60(b), some independent statutory or constitutional basis for jurisdiction must exist. *In re Hunter*, 66 F.3d at 1005. As the court of appeals correctly held, no independent statutory or constitutional basis for federal jurisdiction exists in the Fraud Case.

If the plaintiffs in the Fraud Case had filed a motion pursuant to Rule 60(b)(3), there may have been federal jurisdiction as part of the original case. *In re Hunter*, 66 F.3d at 1005. They did not do so. If the Fraud Case plaintiffs had alleged "fraud on the court," federal supplemental jurisdiction may have been available to the court to "vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380. They made no such allegation.

Instead, however, the Fraud Case plaintiffs asserted a garden variety state law fraud claim which, at best, may fit within Rule 60's broad catch-all "independent action." As such, however, no independent federal jurisdictional basis exists. *In re Hunter*, 66 F.3d at 1005-06.

Even if Rule 60 were substantive federal law, Rule 60 does *not* completely preempt all state law cases that include fraud counts and that relate to prior federal settlements.

> [N]othing in the language of Rule 60(b) supports the defendants' contention that it precludes an action for fraud in connection with a settlement. Rule 60(b) denotes instances when a court "may relieve a party . . . from a judgment," but it does not purport to cover damages actions for fraud and seek to affirm or ratify a judgment rather than seek relief from a judgment. Its focus is on a specific remedy — obtaining relief from a judgment — not on all available remedies for fraud.

Cresswell v. Sullivan & Cromwell, 668 F. Supp. 166, 169 (S.D. N.Y. 1987). *See also In re Hunter*, 66 F.3d 1002 (9th Cir. 1995).

In *Cresswell*, defendants argued that the plaintiffs' common law fraud claim fell within Rule 60(b) and created federal question jurisdiction. Defendants also argued that plaintiffs were required to reopen the judgment and put both parties back in the position they were in prior to settlement. *Cresswell*, 668 F. Supp. at 171. The Court rejected this argument, and held:

> If this were the rule, few plaintiffs would choose to enforce their claim for fraud in connection with a settlement, no matter how valid their cause of action. A plaintiff who must give up any benefit he has gained and risk receiving nothing in return would be reluctant to enforce his rights as a fraud victim. . . . Because the relief sought falls outside the reach of Rule 60, that rule cannot be said to require the plaintiffs to tender back their settlement and sue to reopen the earlier judgment. Plaintiffs may instead affirm the earlier settlement and seek damages for the alleged fraudulent inducement of the settlement.

Id. at 172.

C. There is no supplemental federal jurisdiction in this case.

In *Kokkonen*, this Court specifically held that the concept of supplemental jurisdiction cannot be stretched far enough to include jurisdiction over suits relating to prior federal settlements. *Kokkonen*, 511 U.S. at 380. The Court held that when parties to a federal court lawsuit settle and jointly move to dismiss a case, the federal court does not retain supplemental jurisdiction over disputes arising out of that settlement agreement unless the district court has expressly reserved the right in its order to enforce the settlement agreement. *Id.* at 381-82. In the present case, the order dismissing the Chlordane Case did not retain jurisdiction over settlement disputes. *See* Petition, App. J.

Whether the dispute is one for breach of contract or fraud, there is no supplemental jurisdiction. Following this Court's decision in *Kokkonen*, a federal district court applied the appropriate analysis and remanded a case removed on the grounds that fraud claims arising out of a settlement in federal court created federal question jurisdiction. *ALFAB, Inc. v. CNA Financial Corp.*, 877 F. Supp. 1538 (M.D. Ala. 1995). In *ALFAB*, parties to a federal lawsuit executed a settlement stipulation resolving the action; the district court adopted the settlement stipulation and dismissed the case with prejudice. Over a year later, the plaintiffs sued the same defendants in the Alabama state court alleging that the defendants acted fraudulently in procuring the settlement agreement reached in the previous action, misrepresented the material information during settlement negotiations and wrongfully canceled certain insurance policies. *Id.* at 1539.

The defendants removed the case and contended that the federal court had supplemental jurisdiction pursuant to Rule 60(b) because the plaintiff's fraud action necessarily questioned the validity of the settlement agreement in federal court. Relying on *Kokkonen*, the court remanded the case.[4] *Id.* at 1540. Similarly, remand was required in the case at bar.

The district court in the instant case attempted to distinguish *Kokkonen* by recharacterizing the claims asserted in the Fraud Case as an attack on a prior federal judgment. It is not such a case, however, and the district court had no authority to violate the well-pleaded complaint doctrine. Respondents do not seek to undo the prior judgment or settlement. This case is a straightforward suit for fraud in settlement negotiations, and *Kokkonen* applies and resolves the issue. Supplemental jurisdiction does not exist.

III.

THE COURT OF APPEALS DID NOT EXCEED ITS JURISDICTION IN RULING ON RESPONDENTS' MANDAMUS PETITION.

The court of appeals acted within its jurisdiction when it reversed the district court's decision and vacated the district court's order denying remand. Petitioners argue that, because the court of appeals denied the specific mandamus relief of ordering the remand of the Fraud Case, it was without appellate jurisdiction to reverse and vacate the district court's order denying remand. Petition at 21-22. In making this argument, Petitioners mischaracterize the court of appeals' ruling on Respondents' petition for writ of mandamus.

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4. The *ALFAB* court also rejected the defendants' reliance upon previous cases upholding federal jurisdiction over settlement disputes decided prior to this Court's decision in *Kokkonen*. *Id.* at 1540.

In their petition for writ of mandamus, Respondents asked the court of appeals to (i) issue a writ of mandamus directing the district court to vacate her Order Denying Motion to Remand entered April 21, 1997, and (ii) to enter an order remanding the Fraud Case to state court in Harris County, Texas. Instead of issuing a writ of mandamus directing the district court to vacate its order denying Respondents' motion to remand, the court of appeals vacated that order itself. By doing so, the court of appeals granted Respondents part of the mandamus relief they sought — a reversal and vacation of the district court's order denying remand. Accordingly, this critical mandamus relief sought by Respondents was granted by the court of appeals — *not* denied.

The relief denied by the court of appeals was Respondents' request that the case be remanded to state court. Rejecting that request, the court of appeals instead remanded the case to the district court so it could consider for the first time the issue of diversity jurisdiction. Petition, App. A at 1a.

In sum, the court of appeals granted in part and denied in part Respondents' petition for writ of mandamus. Petitioners' argument that the court of appeals acted without jurisdiction, therefore, rests on the premise that the court of appeals has no jurisdiction to grant part, but not all, of the relief requested in a mandamus petition. This premise is legally incorrect, as federal law does not preclude a court of appeals from partially granting mandamus relief, and courts of appeals, including the Fifth Circuit Court of Appeals, routinely grant such relief. *See In re Terra Int'l, Inc.*, 134 F.3d 302, 303 (5th Cir. 1998) (granting in part and denying in part request for mandamus relief).

Notably, Petitioners do not contend that the court of appeals lacked jurisdiction to consider the merits of Respondents'

mandamus petition. They argue only that, as a result of the denial of mandamus relief, the court of appeals lacked jurisdiction to reverse and vacate the district court's order denying remand to state court. As demonstrated above, the denial of mandamus relief was only partial. The court of appeals *granted* Respondents part of the relief they requested in their petition for writ of mandamus regarding the district court's order denying remand. The court of appeals had the jurisdiction to do so, and Petitioners' argument to the contrary is without merit.

In any event, all federal courts have a continuing obligation to examine the basis for their jurisdiction, and that issue may be raised by the parties or by the court *sua sponte* at any time. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.' ") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The court of appeals acted within its jurisdiction when it determined, in reversing and vacating the district court's order denying remand, that there is no federal question jurisdiction in the Fraud Case.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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